

BUREAU OF LAW

MEMORANDUM

*Corporation Tax Determinations**A-2**American - West African
Line, Inc.*

TO: Commissioners Murphy and Macduff

FROM: E. H. Best, Counsel

SUBJECT: American West-African Line, Inc.
Application for revision or refund
of franchise taxes assessed under
Article 9-A for the calendar year
1960

A hearing was held with reference to the above-entitled matter on October 19, 1965 at the office of the State Tax Commission in New York City, at which William J. Shields, taxpayer's Vice President, appeared with Emanuel Goldstein, Esq. of Counsel to Herman Goldman, Esq., attorney for the taxpayer. The evidence and exhibits produced were as shown by the transcript.

The issue involved was includability of a capital gain realized on the sale of real property situate without the State in computing franchise tax for the year 1960. This involves the question of whether the taxpayer's business activities within and without the State were of a unitary nature.

Taxpayer, a domestic corporation, maintains offices in New York and Lagos, Nigeria. The corporation operates a general world-wide steamship agency, for foreign ship owners, receiving a commission on freight booked. In order to obtain personnel for the Nigerian office it was necessary for the taxpayer to furnish housing. A house acquired in 1932 for this purpose was sold in 1960, resulting in a capital gain of \$96,052. No taxes were paid to Nigeria nor was any tax imposed in Africa on the gain realized on the sale.

In both New York and Lagos, the taxpayer's operations are the same. It solicits and books freight consigned to the same destination, on the same vessels, for the same principals. The Lagos operation was characterized as "flow-back," providing cargo for homeward bound vessels which would otherwise return unladen. Similar operations are conducted in other parts of the world on taxpayer's behalf by independent agents and a subsidiary in England. Taxpayer is a single business entity, primarily concerned with maritime freight cartage, between the United States and West Africa for a limited group of principals. The form of bill of lading used in Lagos is denominated "HOMEWARD FORM", and describes the taxpayer as agent for the same principals whose names also appear on the New York form of bill of lading.

A 1960 franchise tax return was filed, reporting net income of \$82,035.91, which included the capital gain. A carryback adjustment made in 1963 resulted in reduction of net income to \$41,321.46 for 1960.

Taxpayer contends that the entire capital gain should be excluded from its 1960 return resulting in a net operating loss for that year, on the authority of Sheraton v. State Tax Commission, 15 A D 2d 142, 222 N.Y.S. 2d 192, aff'd 13 N Y 2d 802, 242 N.Y.S. 2d 226, alleging that its African operations "are in no way dependent upon taxpayer's operations in New York", that "taxpayer's operations in West Africa are maintained under separate accounts" and that by inclusion of the gain "an inequitable result is obtained."

In the Sheraton case the holding was arrived at by findings that the taxpayer's business operations as hotel innkeeper in New York and office building management in Massachusetts were not of a "unitary" nature within and without the State and were "unconnected economically"; that imposition of the franchise tax should bear a reasonable relationship to the amount of business done within the State; that there was a disparity between the tax as levied and the value of the property owned in New York and the true income from New York operations. Moreover, in Sheraton, a tax was paid on the gain to Massachusetts, the place where the real property was situate.

None of these elements are present here. Although it was contended by the taxpayer that separate records were kept, no evidence of the value of its property, receipts and wages in Nigeria was offered or presented. Taxpayer's operations are exactly the same, world over, and could not be more unitary or economically connected. The stated purpose of the Lagos operation was to provide "flow-back" of freight from West Africa, in order to earn commissions "coming and going." It matters little whether the freight moves easterly or westerly. It moves in the same vessels with the same crews under the aegis of the same management. For these reasons the Sheraton case must be distinguished as being inapplicable.

Accordingly, I am of the opinion that the hearing officer properly determined that the New York and Lagos business operations of the taxpayer were of a unitary nature and economically connected; and that pursuant to sections

208.9 and 210.8 of the Tax Law, and application of the "Rand-McNally" method, whereby the selling price is used in computing the property factor in lieu of the book basis of the property sold and the amount of the gain on the sale is used in computing the receipts factor in lieu of the selling price, in determining the business allocation, taxpayer's franchise taxes for 1960 were properly resettled and recomputed. Use of the Rand McNally method is favorable to the taxpayer and results in adjustment of the franchise tax in the sum of \$121.87, by reduction of the business allocation from 51.2554% to 45.8931%.

The determination is, therefore, approved.

E. H. Best
Counsel

November 16, 1966

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Enc.

THE STATE TAX COMMISSION

In the Matter of the Application
of
AMERICAN-WEST AFRICAN LINE, INC.
For revision or refund of franchise
tax under Article 9A of the Tax Law
for the calendar year 1960.

American-West African Line, Inc., the taxpayer herein, having filed application for revision or refund of franchise tax under Article 9A of the Tax Law for the calendar year 1960, and a hearing having been held in connection therewith at the office of the State Tax Commission in New York City on October 19, 1965, before William F. Sullivan, Senior Tax Administrative Supervisor of the Corporation Tax Bureau of the Department of Taxation and Finance, at which hearing William J. Shields, vice president of the taxpayer, appeared personally and testified, together with Emanuel Goldstein, Esq. of Counsel, and the record having been duly examined and considered by the State Tax Commission,

(1) That the taxpayer was incorporated under the laws of New York on or about June 19, 1980;

(2) That the tax for the calendar year 1960 was
recomputed and restated as follows:

Entire Net Income	\$82,035.91
Less carryback loss from 1961	<u>40,714.45</u>
Corrected Net Income	\$41,321.46
Business Allocation	51.2554%
New York Base	21,179.48
Tax at 5 1/2%	\$ 1,164.87

(3) That the tax was res audited and restated on February 15, 1963, and application for revision or refund was filed on October 30, 1963;

(4) That the taxpayer is an agent for foreign steamship lines with places of business in New York City and Lagos, Nigeria, West Africa, in addition to acting as an agent in West Africa, it also is engaged in the lightering and stevedoring business;

(5) That in order to provide living accommodations for its personnel in Lagos, West Africa, the taxpayer acquired certain residences; that on September 30, 1960, one of the houses, acquired in 1932, was sold for \$98,389.60, on which the taxpayer realized a net profit of \$96,052.00; that, over the years, the value of the property was reflected in the segregation of assets and/or the property factor of the business allocation on the franchise tax returns of the taxpayer; that depreciation, real estate taxes and other deductible expenses attributable to the houses were deducted on the prior years' franchise tax returns in computing entire net income; that no tax on the profits on the sale of the house was imposed by West Africa;

(6) That Section 208.9 of Article 9A provides, in part:

"9. The term 'entire net income' means total net income from all sources, which shall be presumably the same as the entire net income which the taxpayer is required to report to the United States treasury department * * *, except as hereinafter provided.";

and that none of the exceptions provides for the deduction of capital gains;

(7) That Section 210.8 of Article 9A provides, in part:

"8. If it shall appear to the tax commission that any business or investment allocation determined as hereinabove provided does not properly reflect the activity, business, income, or capital of a taxpayer within the state, the tax commission shall be authorized in its discretion, in the case of a business allocation percentage, to adjust it by * * *, or (d) any other similar or different method calculated to effect a fair and proper allocation of the income and capital reasonably attributable to the state * * *."

Upon the foregoing findings and upon all of the evidence presented, it is hereby

DETERMINED:

(A) That under Section 210.8 of the Tax Law the business allocation is adjusted by,

(1) reflecting in the property factor the house sold in West Africa at its fair market value, the sales price of \$98,390, for the nine months of the base period it was held, rather than the depreciated book value of zero, resulting in a revised property factor of 36.84121;

(2) reflecting in the denominator of the receipt factor the capital gain of \$96,032.00, resulting in a revised receipt factor of 31.6014%; the foregoing changes resulting in a revised business allocation percentage of 45.8931%, and a resettled tax computed as follows:

Income Previously Taxed	\$41,321.46
Corrected Business Allocation	45.8931%
New York Base	18,963.70
Tax at 5½%	\$ 1,043.00

(B) That the resettled tax does not include taxes or other charges which are not legally due.

Dated: Albany, New York

this 22nd day of November 1966

THE STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

COMMISSIONER

/s/

JAMES R. MACDUFF

COMMISSIONER

COMMISSIONER